

Supreme Court, U. S.
FILED

DEC 7 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. ~~77~~-813

UNITED STATES OF AMERICA,

Respondent,

v.

JOSE JESUS URIAS,

Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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 PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Jose Jesus Urias, hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A2) is an unreported memorandum decision. The district court issued no written opinion.

JURISDICTION

The judgment and opinion of the Court of Appeals were issued on 22 August 1977. A timely Petition for Rehearing was denied by order of the Court of Appeals on 8 November

1977 (Appendix B, *infra*, p. B1). Defendant's Application to Stay Execution of Mandate Pending Certiorari was denied on 21 November 1977 (Appendix C, *infra*, p. C1). The jurisdiction of the Supreme Court to review this case on Petition for Writ of Certiorari is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether, in the context of an entrapment defense, it was a denial of the defendant's Fifth and Sixth Amendment rights for the trial court to refuse to allow the defendant to reopen his case, prior to argument, instructions and submission to the jury, for purposes of calling a witness who could testify, based on his own knowledge, to facts relevant and critical to the defense, who had been previously called and refused to testify on Fifth Amendment grounds and who had changed his position moments before the re-question to reopen had been made.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment Five:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment Six:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

This case concerns the propriety of a trial court's refusal to allow a criminal defendant to reopen his case to call as a witness the only person who could corroborate his defense, prior to closing argument and the submission of the case to the jury. The circumstances which culminated in the trial court's denial of the defendant's request to reopen and call this witness forms the crux of the controversy.

Urias was charged with one count of knowing and intentional distribution of heroin in violation of 21 U.S.C. § 841 (A)(1) and (B). At trial Urias admitted the essential facts of the indictment and relied on an entrapment defense.

Urias testified that his first contact with anyone in connection with the transaction that led to the indictment occurred six to eight weeks prior to his arrest. The initial contact was made through an individual named Victor Bizzcara. Bizzcara told Urias that his associate Angel had a friend from Las Vegas named Pelon who was in the Mafia. Pelon was actually a DEA agent.

Angel told Bizzcara to seek out Urias in an effort to purchase heroin from him. Urias denied knowledge about dealing in heroin and informed Bizzcara that he could be of no assistance. After inquiring of Bizzcara as to why he had

sought him out, Bizzcara responded by stating that Angel knew Bizzcara and Urias were friends and thought he may be able to locate a source of heroin.

Bizzcara returned to visit with Urias on one or two occasions each week for the following six weeks. After the first few rebuffs by Urias, Bizzcara disclosed that Pelon was applying pressure to him to come up with a source for heroin. He had threatened Angel with injury to himself or his family if he should fail to produce a seller of heroin. Only after the continued pressure of Bizzcara and the disclosure of physical threats, did Urias arrange for and deliver the heroin.

During the second or third week of the Bizzcara-Urias meetings, Bizzcara told Urias about a heroin transaction which failed to materialize in Tucson, Arizona. In this transaction, Pelon met with Bizzcara, Angel and a fourth individual known only as Jess. When Jess failed to produce narcotics, Pelon became angry with Angel and told him and Jess that failure to produce a seller could lead to injury. This story also induced Urias to participate in the crime.

At trial, the informant, Angel, was called as a witness by Urias. Angel denied that he had informed anyone that Pelon was threatening to kill or harm anyone because of the failure to supply a source for narcotics. He denied instructing Bizzcara to persuade Urias to find heroin. He denied ever telling Bizzcara that Pelon was in the Mafia.

The only witness who could corroborate Urias' entrapment testimony and impeach Angel was Bizzcara. When called to the stand he initially refused to testify on Fifth Amendment grounds. However, the following day, and before

argument or instructions to the jury, Bizzcara indicated to counsel for the defendant that he wished to take the stand and testify without benefit of his Fifth Amendment privilege. The defendant was denied the opportunity to recall Bizzcara when the trial court refused to permit Urias to reopen his case. Urias was convicted and sentenced on 29 November 1976 to a term of incarceration of 12 years along with a special parole term of three years. He is presently in custody pending this appeal.

REASON FOR GRANTING THE WRIT

Urias contends that the writ should be granted for the reasons that the Court of Appeals: (1) has rendered a decision apparently in conflict with the decision of other courts of appeals on similar matters; (2) has apparently decided a federal question in a way in conflict with applicable decisions of this court; and (3) has sanctioned a departure from the accepted and usual course of judicial proceedings and this court should exercise its power of supervision. Urias contends that the trial court's failure to allow him to reopen his case and call as a witness the only person who could corroborate his entrapment defense was an abuse of the trial court's discretion which violated his Fifth Amendment right to due process of law and his Sixth Amendment right to call witnesses on his behalf.

The Court of Appeals has failed to follow the spirit of this court's decision in *Washington v. Texas*, 388 U.S. 14 (1967). In that case, this court recognized that the right to offer the testimony of witnesses and to compel their attendance is in plain terms the right to present a defense. Subsequently, in *Webb v. Texas*, 409 U.S. 95 (1972), this

court was confronted with a situation wherein a state trial judge intimidated a witness by threatening him with imprisonment if he should commit perjury. After this admonition, the witness refused to testify and the defendant was convicted. This court reversed the conviction, holding that the trial judge's threatening remarks directed at the single witness for the defense effectively drove the witness off the stand and deprived the petitioner of due process of law under the Fourteenth Amendment. Thus, the opinion stands for the proposition that if a defense witness is excluded, either by operation of law or by virtue of the trial court's intimidation, a defendant is denied his Sixth Amendment right to present a defense and his Fifth Amendment right to due process.

Other circuits have consistently concluded that, in the absence of fault, the defendant is denied his Fifth Amendment right to due process of law when the trial court prevents the defendant from calling a witness whose testimony is relevant; *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *Brazwell v. Wainright*, 463 F.2d 1148 (5th Cir. 1972); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973); *United States v. Stefano*, 476 F.2d 324 (7th Cir. 1973).

Two cases decided in the United States Court of Appeals for the Ninth Circuit have reversed convictions, in a similar setting, when the trial judge refused to allow the defendant to call a witness to the stand. In *Taylor v. United States*, 388 F.2d 786 (9th Cir. 1967), the defendant's conviction was reversed on the grounds that the trial judge abused his discretion by not allowing the defendant to call a witness who had violated the court's sequestration order.

Likewise, the decision in *United States v. Keller*, 523 F.2d

109 (9th Cir. 1975), is particularly appropriate to the case at bar. Keller was prosecuted for tax evasion on a net worth basis. Following the announcement by counsel that they rested, the defendant sought to reopen for purposes of calling Mrs. Keller to testify as to certain expenditures. The court refused to grant the defendant leave to reopen to present this relevant testimony. Keller's conviction was reversed on the grounds that the trial court abused its discretion in refusing to grant the defendant leave to reopen.

The decision in *Keller, supra*, seems to hold that when a defendant seeks to reopen to present relevant evidence which he was justified in not earlier presenting, the trial court abuses its discretion in denying the motion for leave to reopen. This is precisely what happened in the case at bar. Urias could not predict, when he closed his case, that early the next day Bizzcara would change his mind, agree to waive his Fifth Amendment rights, and testify in corroboration of the defendant's theory of the case.

Urias was not at fault in not having earlier offered Bizzcara's testimony. Bizzcara's testimony was not only relevant and material, but he was the *only* person that could impeach the government's witnesses and corroborate the defendant's entrapment defense. The trial judge's order refusing to allow Bizzcara to be recalled as a witness obviously denied Urias an essential part of his defense.

This court has repeatedly held that a defendant in a criminal case is denied his Fifth Amendment right to due process of law and his Sixth Amendment right to call witnesses in his behalf when a trial court refuses to allow a proffered witness to testify. The opinion affirming Urias' conviction conflicts with these decisions as it does with decisions of

other circuit courts of appeal. Urias contends that the trial court's refusal to allow his motion for leave to reopen departed from the accepted and usual course of judicial proceedings and that this court should exercise its supervisory powers and grant the writ.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
DEBUS, BUSBY & GREEN, LTD.

By Jordan Green
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Robert J. Lyman
Attorneys for Petitioner

APPENDIX A

Do Not Publish

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF)
AMERICA,)
Plaintiff-Appellee,) NO. 76-3620
v.)
JOSE JESUS URIAS,)
Defendant-Appellant.)

MEMORANDUM

(FILED: August 22, 1977)

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, ANDERSON, Circuit Judges, and
SPENCER WILLIAMS*, District Judge

Urias was convicted of knowingly and intentionally distributing heroin in violation of 21 U.S.C. § 841(a)(1) and (b). The sole issue here is whether the trial court erred in denying Urias' motion to reopen his case the day after both sides had rested, but before argument and instructions.

Urias admitted all the essential elements of the offense but raised a rather complicated entrapment defense. In essence Urias claimed that he was coerced by his friend, and business associate Bizzcara to obtain and deliver the heroin; that Bizzcara was compelled to do so because of threats from one Angel Zavala (who was later identified as a paid government informer) and that Zavala was acting under pressure from one 'Pelon', who purportedly had mafia

connections but in actuality was DEA Agent Bruce Zavala denied having made any threats to Bizzcara or anyone else. When Bizzcara was called to collaborate Urias' testimony as to pressure to get the drugs, and to refute Zavala's contrary testimony, he declined to testify under his fifth amendment privilege against self incrimination. Thereafter both sides rested and the matter was put over to the following afternoon for argument and instruction.

When on the following afternoon counsel for the parties and the court met in chambers prior to argument, counsel for the defense explained that Bizzcara now wished to testify and that the defense desired to reopen its case. When the judge was informed that Bizzcara's testimony would corroborate the defendant's testimony as to Zavala's statements that Zavala's friend was being threatened, the court initially urged the defense attorney to get Bizzcara. Only after the government pointed out that it would need Zavala to rebut the testimony of Bizzcara, and that Zavala was no longer available since he left town after both sides had rested their cases, did the court refuse permission to reopen the case.

The trial court has wide discretion in permitting a party to reopen his case in chief. United States v. Keller, 523 F.2d 1009 (9th Cir. 1975). There is no showing of abuse here. The trial court properly concluded that it would be unfair to permit defendant to reopen the case at such a later hour, more than twenty-four hours after both sides had rested, when the result would be to prevent the government from rebutting any testimony the witness might give.

Affirmed.

APPENDIX B

(Title of Action)

(FILED: November 8, 1977)

ORDER

Before: BROWNING and ANDERSON, Circuit Judges, and WILLIAMS, District Judge*

Permission for late filing of the petition for rehearing is granted.

The petition for rehearing is denied.

*Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

APPENDIX C

(Title of Action)

(FILED: November 21, 1977)

ORDER

Before: BROWNING and ANDERSON, Circuit Judges

The application of defendant-appellant to stay execution
of the mandate pending certiorari is denied.

Supreme Court, U.S.

FILED

FEB 2 1978

No. 77-813

MICHAEL RODAK, JR., CLERK

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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In the Supreme Court of the United States

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JOSE JESUS URIAS, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
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THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1977. A petition for rehearing was denied on November 8, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 7, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion when, on the day following the close of evidence, it denied petitioner's motion to reopen his case.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 12 years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that on August 30, 1976, petitioner agreed in the presence of informant Angel Zavala to sell 30 ounces of heroin to undercover Drug Enforcement Administration Agent Gilbert Bruce for \$36,000 (Tr. 62-65). The parties agreed that the exchange would take place in a Phoenix motel (Tr. 66). Petitioner arrived at the motel with a small bag containing heroin. After examining the heroin, Bruce gave a prearranged arrest signal; other agents then entered the room and arrested petitioner (Tr. 70, 71-74).

Petitioner admitted all of the essential elements of the offense (Tr. 249, 254-261), but asserted that his friend Victor Bizzcara had coerced him to obtain and deliver heroin and that Bizzcara had been compelled to do so by threats from Zavala, who in turn had allegedly been acting under pressure from Agent Bruce (Tr. 240-241, 245-248).¹

Zavala denied having threatened Bizzcara or anyone else (Tr. 187, 216-218). Petitioner called Bizzcara to corroborate his testimony concerning Zavala's threats, but Bizzcara declined to testify, invoking his Fifth Amendment privilege against self-incrimination (Tr. 242-243).

¹Petitioner contended that this amounted to entrapment, but the defense might more properly be called duress in light of the allegations of threats of harm; unlike the entrapment defense, the duress defense does not turn on evidence of the defendant's pre-disposition to commit similar crimes.

Petitioner and the prosecution rested their cases, and the district court recessed proceedings until the next afternoon, when argument and instructions to the jury were scheduled. Just prior to summation, defense counsel moved to reopen his case; counsel stated that Bizzcara had decided to testify and would corroborate petitioner's testimony concerning Zavala's threats (Tr. 269-271).² Although the district court initially was disposed to grant the motion, it ultimately refused to reopen the case when it learned that Zavala, who alone could rebut Bizzcara's testimony, had left town after both sides had rested their cases the previous day and was unavailable as a witness (Tr. 271).

ARGUMENT

Petitioner contends that the district court should have allowed him to reopen the case to present Bizzcara's testimony concerning Zavala's alleged threats. Petitioner concedes, as he must, that a motion to reopen a case after a party rests is addressed to the sound discretion of the district court. *United States v. Bridgefourth*, 538 F. 2d 1251, 1253 (C.A. 6); *United States v. Webb*, 533 F. 2d 391, 395 (C.A. 8); *United States v. Sisack*, 527 F. 2d 917, 919-920 (C.A. 9); *United States v. Levin*, 443 F. 2d 1101, 1107-1108 (C.A. 8), certiorari denied, 404 U.S. 944; *Rhyne v. United States*, 407 F. 2d 657, 661 (C.A. 7). The court must consider, among other things, the opposing

²Defense counsel summarized Bizzcara's testimony as follows (Tr. 271):

Judge, he is going to testify to exactly the same pre-arrest things that the defendant testified to, that Angel [Zavala] mentioned the Mafia, that if he didn't cooperate, that "Pelon" would grab a kid, that he would do anything, but that he forced people to cooperate with him.

party's opportunity to meet the new evidence and the probability that the evidence, presented after the party has rested, will have a disproportionate effect on the jury's deliberations. *United States v. Webb, supra*; *Rhyne v. United States, supra*.

Here, both factors support the court's denial of the motion. The prosecutor had no opportunity to rebut the proffered testimony of Zavala's alleged threats, because Zavala had become unavailable following the close of evidence on the previous day. Moreover, the new evidence, presented a full day after the close of all the evidence, might well have had a disproportionate impact on the jury's deliberations. In these circumstances, the trial court did not abuse its discretion in denying petitioner's motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.